BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEREMIAH BLOCK	)	
Claimant	)	
	)	
VS.	)	
	)	
MASONITE DOOR CORPORATION	)	
Respondent	)	Docket No. 1,008,477
	)	
AND	)	
	)	
LUMBERMEN'S UNDERWRITING ALLIANCE	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the February 10, 2006, Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on May 24, 2006.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Mark J. Hoffmeister, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. This claim involves two separate accidents. During oral argument to the Board, the parties agreed that there should be a single award of permanent partial disability compensation for the combined effects of the injuries suffered and that the later accident date should be used for computation of that permanent partial disability award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant unreasonably refused to perform the accommodated work offered by respondent. The ALJ, therefore, imputed the wage claimant would have received had he continued in the accommodated employment. As the imputed wage exceeds 90 percent of claimant's preinjury average weekly wage

(AWW), the ALJ found that claimant was not entitled to work disability and limited the permanent partial disability award to claimant's percentage of functional impairment.

Claimant asserts that the ALJ erred in finding that he refused accommodated work, claiming that he was constructively discharged by respondent. Claimant contends, therefore, that he is entitled to a work disability.

Respondent and its insurance carrier (respondent) request that the ALJ's Award be affirmed in its entirety.

The parties have stipulated that claimant sustained a 14 percent functional impairment to the body as a whole as the result of his work injuries. Therefore, the only issue is whether claimant is entitled to permanent partial disability compensation based upon a higher percentage of work disability. Specifically, is claimant precluded from receiving a work disability because he voluntarily left his employment with respondent after working an accommodated position within his restrictions that paid him a comparable wage, and if not, what is his percentage of wage loss and task loss?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a general laborer at respondent. On October 7, 2002, he injured his back when he was moving a very heavy mold. Claimant was sent to Dr. Daniel Koehn, who ordered an MRI. The MRI showed a mild left paracentral disc bulge at L4-5 and L5-S1. He was referred to Dr. Jeffrey Greenberg, who prescribed a TENS unit. Claimant was also sent to Dr. Dennis Estep, who performed three epidural steroid injections. He returned to work at his original job, but his back got progressively worse. On August 6, 2003, claimant was again injured when he bent down to grab a pallet and, as he stood back up, he had pain in his left lower back and thigh. Claimant returned to Dr. Estep, who ordered another MRI. The second MRI showed central and left paracentral small disc protrusion with superior disk extrusion which produced mild central spinal stenosis and mild to moderate left lateral recess stenosis. The left L-5 nerve was deviated, and there was left L-5 foraminal stenosis. Claimant was then referred to Dr. Hish Majzoub, a neurosurgeon, who performed a diskectomy. Claimant was released to return to work on January 13, 2004, with restrictions against lifting weights greater than 25 to 30 pounds and excessive bending.

Respondent provided claimant with a modified job on the steel door line. The job on the steel door line required him to put pieces of foam on the sides of doors as they came down the assembly line. Claimant agreed that the accommodated job respondent provided was a light duty job. He stated, however, that while working on the steel door line,

when the doors came down the line and passed him, he had to twist his body around to insert the pieces of foam in the door. This twisting motion caused his back to hurt. At the Regular Hearing, he testified that this twisting was the only complaint he had as far as the accommodated job violating his restrictions. In a deposition taken on November 2, 2005, however, claimant's main complaint about the accommodated job seemed to be that it forced him to bend forward and reach across his body. He testified that because of the pain in his back, he left work early some days, and he also missed several days of work. Claimant requested that a functional capacities evaluation be done and that he be authorized to obtain treatment from a pain clinic. It appears that neither of these requests were approved by respondent.

On January 30, 2004, claimant was seen by Dr. Estep, who told claimant to continue his restrictions of no lifting, pushing, or pulling greater than 25 pounds, and minimal bending or twisting. Dr. Estep also indicated that claimant should alternate sitting, standing, and walking. Claimant was provided with a stool with no back. According to the claimant, this was replaced with a stool with a back held on by duct tape. Neither stool had any back support. Claimant contends he complained about the chair to his supervisor.

On March 4, 2004, claimant told his supervisors that he could not work on the steel door line. He was told that if he left work, he would be considered terminated. He then told his supervisors that his pain was too bad for him to continue, and he clocked out. That was his last day of work at respondent. Respondent's policy was that after four absences, an employee could be terminated. Claimant received a letter after his termination stating that he had eight absences. Claimant testified that all but three of his absences were due to his back pain.

Claimant drew unemployment benefits for awhile. While doing so, he looked for work. In August 2004, he accepted employment at Hometown Electric, where he makes $9 per hour and works 40 hours per week. He has no fringe benefits, and he seldom gets overtime. In his current job, claimant installs boxes necessary for fiberoptic service. He testified that he sometimes has to get on his knees to do his work. He carries a plastic tool box which weighs about 20 pounds. When he runs wire, he is required to reach above his head. He said there was very minimal twisting involved in that job.

Dr. Edward Prostic, a board certified orthopedic surgeon, saw claimant at the request of claimant's attorney on March 31, 2003, which was after his first work-related injury in October 2002 but before the second injury in August 2003. Dr. Prostic performed an examination of claimant and testified that the results of the examination were consistent with the mechanism of injury at respondent. Dr. Prostic diagnosed claimant with a low back injury, most likely a disc protrusion at L5-S1 with development of S1 radiculopathy.

Dr. Prostic again saw claimant on February 20, 2004. Claimant had returned to regular employment but had a worsening of his condition and had a second injury on August 6, 2003. He had been seen by Dr. Estep, who ordered an MRI, which showed disc

herniation at L5-S1. He was then referred to Dr. Majzoub, who performed a diskectomy of L5-S1 on the left. Claimant had been released to return to work on January 13, 2004, with restrictions of no lifting greater than 25-30 pounds and to avoid repetitious bending. Claimant continued to have pain from his low back to his left thigh with numbness and tingling going to the left heel.

Dr. Prostic performed an examination of claimant and concluded that claimant had sustained herniation of the disc at L5-S1 on the left, for which he had surgery. Dr. Prostic opined that claimant had an 18 percent permanent partial impairment of the body as a whole based on the AMA *Guides*.[1] He agreed with Dr. Majzoub's lifting restrictions and also felt that claimant should avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, and captive positioning.

Dr. Prostic last saw claimant on January 28, 2005. At that time claimant had restrictions from Dr. Majzoub of lifting up to 50 to 60 pounds but was to avoid manual and heavy manual work that would require bending and raising up continuously. He had left his employment with respondent and had begun working for a new employer. Dr. Prostic again examined claimant and his diagnosis and recommended restrictions remained the same, except that he increased claimant's lifting restriction to 40 pounds occasionally and 15 pounds frequently. Dr. Prostic reviewed the task list of Karen Terrill and opined that claimant had a 62 percent task loss based on his inability to perform 29 of the 47 tasks identified.

Dr. Hish Majzoub, a board certified neurosurgeon, first saw claimant on September 16, 2003. Claimant gave him a history of his two back injuries and his past medical treatment and said he had back pain that radiated into his left leg to his foot.

Since claimant had no improvement with therapy or pain medication, Dr. Majzoub recommended surgery and performed a lumbar laminectomy and microdiskectomy of L5-S1 on the left on October 3, 2003. Claimant's progress after surgery was very slow compared to other patients, so Dr. Majzoub ordered an MRI to see why he was not progressing. That MRI showed scar tissue but no recurring disk. On January 23, 2004, Dr. Majzoub indicated that claimant had reached maximum medical improvement (MMI). He released claimant from treatment on March 3, 2004, with a recommendation that claimant be provided a chair with a good back support while working.

Dr. Majzoub testified he had reviewed a DVD of claimant doing some activities. On the DVD, claimant did not seem to limp or walk with any limitations. Dr. Majzoub felt that claimant's activities and the way he walked while being videotaped were not consistent with his complaints when he was in his office. Based on what he saw on the DVD, Dr. Majzoub opined that claimant did not need any more treatment. Dr. Majzoub had previously

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[1]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

discussed with claimant the possibility of pain management treatment, but after claimant had a negative MRI and EMG and after reviewing the DVD, he decided that a pain clinic would not offer claimant much. Dr. Majzoub gave claimant restrictions of no lifting above 50 or 60 pounds and to avoid frequent bending and raising up. He felt that claimant would be able to work at respondent within those restrictions.

Dr. Majzoub reviewed a task list compiled by Dick Santner. Of the 35 tasks listed, Dr. Majzoub believed that claimant could no longer perform 7, for a 20 percent task loss. He also reviewed a task list compiled by Karen Terrill. Of the 47 tasks listed on that task list, Dr. Majzoub opined that claimant was unable to perform 8, for a 17 percent task loss.

Claimant was referred to Dr. Kevin Komes, who is board certified in physical medicine and rehabilitation, for an EMG to determine whether there was evidence of recurrent or ongoing nerve irritation. The EMG was performed on October 26, 2004, and was normal with no evidence of recurrent radiculopathy or plexopathy. Dr. Komes also reviewed an MRI done after claimant's surgery, which showed there was no evidence of nerve root impingement.

Dr. Komes recommended that claimant start doing exercises, ordered him another TENS unit, and renewed his medications. On December 20, 2004, Dr. Komes opined that claimant was at MMI. He provided claimant with a 10 percent permanent partial disability rating to the body as a whole based on the DRE lumbosacral Category III for radiculopathy of the AMA *Guides*. Dr. Komes stated that although he did not provide restrictions based on claimant's evaluation and the history, patients with this type of problem with no recurrent radiculopathy would be able to lift 50 to 60 pounds and should avoid constant stooping activities. He would not place any restrictions on claimant relative to twisting or turning.

Dr. Komes reviewed the task list prepared by Mr. Santner and opined that claimant would be unable to perform 8 out of the 35 tasks for a 23 percent task loss. He also reviewed the task loss list prepared by Ms. Terrill and opined that of the 47 tasks listed, claimant was unable to perform 11, for a 23.4 percent task loss.

Dr. Komes reviewed a videotape of a demonstration of claimant's accommodated job at respondent. Dr. Komes stated that the tasks being performed in the video are within the claimant's restrictions.

Karen Terrill, a vocational rehabilitation counselor, interviewed claimant by telephone on May 11, 2004, at the request of claimant's attorney. She prepared a task list of 47 tasks claimant performed in the 15 year period before his injury.

Dick Santner, a vocational rehabilitation counselor, met with claimant on July 15, 2005, at the request of respondent. With information from claimant, he prepared a list containing 35 tasks claimant performed in the 15-year period before his work-related injury.

Mr. Santner stated that the wage claimant is earning now of $9 per hour is quite close to what he could expect to earn at this time.

Rick Smith is the environmental and safety director at respondent. He is familiar with claimant and with claimant's injury at respondent. Mr. Smith described the accommodated job claimant was working after he returned to work after his surgery. He videotaped the accommodated job that claimant tried to perform. He testified that the assembly line as depicted on the videotape was working at the normal speed and was not slowed down for the demonstration. The individual being videotaped performing the job was slightly shorter than claimant.

Also on the videotape is some surveillance of claimant taken at a Wal-Mart. An employee of respondent saw claimant at Wal-Mart, so respondent contacted Wal-Mart and got a copy of their surveillance tape. The tape was taken on March 21, 2004, and shows claimant holding a small child but not bending over.

There is also some videotape that shows claimant sitting in a golf cart at a company picnic. Mr. Smith testified that the picture was taken in the summer of 2003, after claimant's injury but before his surgery, and that claimant played golf that day.

Claimant gave a deposition in rebuttal after the deposition of Mr. Smith. He testified that he did not lift anything weighing more than 25 to 30 pounds while he was at Wal-Mart. He was holding his child, who was one year old and who he said weighed 15 pounds. The videotape does not show him bending over.

Claimant testified that the picture of him in a golf cart was taken at a company picnic, but he did not know what year. He has not played golf since his surgery. He has only played golf one time at a company picnic and said it was in 2002 or 2003.

After watching the videotape of the accommodated job at respondent, claimant said the line seemed to be moving slower in the tape than when he worked there.

Andrea Lamar is a private detective who performed surveillance on claimant from February 21, 2004, through February 25, 2004. She testified that on one occasion she observed claimant holding a young child that weighed approximately 35 pounds. She did not obtain videotape of that occurrence. A videotape was admitted which shows claimant climbing in and out of cars, walking, and at one point pumping gas. Ms. Lamar admitted she did not observe claimant lifting anything more than 40 pounds, frequently bending or twisting at the waist, or operating any vibrating equipment.

Chad McCain is a private detective who took videotape of claimant on October 12 to October 13, 2005, while claimant was working at his current job. Claimant was operating a cordless drill. Mr. McCain did not know how much the drill weighed. He did not observe

claimant lifting more than 40 pounds at all or 15 pounds frequently. He did not observe claimant frequently bending or twisting at the waist.

Steve Cox, general manager at respondent, testified that when claimant returned to work after his surgery he was given a job that accommodated his restrictions of no lifting more than 25 to 30 pounds and avoiding excessive bending. Claimant was placed on the Dahlstrom line, which accommodated his restrictions. Claimant, however, requested that he be moved to a different line. Respondent did not have any openings on the line claimant requested, but claimant was placed on the line right beside it, which also satisfied his restrictions.

By the end of January 2004, claimant was starting to miss work. Respondent was notified that claimant needed to have the ability to sit or stand, so to accommodate that restriction, claimant was moved to the steel door line and was given a stool. In the job at the steel door line, doors would go by on an assembly line at the rate of about 900 doors per day, or 90 to 100 per hour. Claimant was to assemble Styrofoam pads into a door as it came by on the assembly line. Mr. Cox observed claimant performing this job and did not see him having to stretch or twist to do this job.

Mr. Cox met with claimant on February 6, 2004, about his absences. During this meeting, claimant was asked if he was working outside his restrictions, and claimant assured him he was not. Claimant told him that he could do the job if he could lie down, but respondent had no jobs where an employee can lie down. However, claimant was given the flexibility to sit or stand while he worked. Claimant did not complain about the twisting at that meeting. During that meeting, claimant was warned that his absences would be counted against him towards potential termination.

Mr. Cox next met with claimant on February 24, 2004. Claimant had missed more days and still wanted to lie down at his job. Claimant said he was feeling pain in his back but again assured Mr. Cox that his job was within his restrictions. Mr. Cox asked claimant if he wanted to return to work, and claimant told him he wanted to be sent home. Mr. Cox refused to send claimant home, telling him respondent had a job for him to do. Claimant told Mr. Cox that his attorney told him not to go home on his own but to have respondent send him home because if he voluntarily left he would not be compensated. Mr. Cox again told claimant that he had a job he could go back to. Claimant said he was not going to return to the job and left.

Mr. Cox's last meeting with claimant was on March 4, 2004. After claimant had been at work an hour that day, he told Mr. Cox that he could not do the job. Claimant again requested that he be sent home so he would not have to voluntarily leave. Claimant asked Mr. Cox what would happen if he did not return to his job. At that time, claimant had seven absences, and Mr. Cox told claimant that if he left, he would be terminated. Mr. Cox again asked claimant to return to work. Claimant told Mr. Cox he was going to leave, and

he got up and left. That day was counted as claimant's eighth absence, and he was terminated.

During none of these meetings did claimant complain that he was twisting or that he was being overworked. Because he never complained, respondent was not given an opportunity to correct the problem. But for claimant's absences, respondent would have continued to accommodate claimant's restrictions. Mr. Cox said that claimant never complained to him about the back support on the chair he was provided. Mr. Cox also testified that the first time respondent was notified that claimant needed a chair with a back support was March 4, 2004, the day claimant was terminated.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.[2] In this case, claimant was terminated for violating respondent's attendance policies. Although claimant disputes the factual basis for the termination, the Board finds the record fails to establish that the termination was made because of claimant's work-related injuries or in bad faith. In fact, the Board finds that the greater weight of the evidence supports a finding that claimant failed to act in good faith. The Board concludes claimant's actions were a willful and knowing violation of the respondent's rules and policies. As such, claimant's conduct was tantamount to a refusal to perform appropriate work as in *Foulk*[3] or a failure to make a good faith effort to retain appropriate employment as described in *Copeland*[4]. Accordingly, because claimant was terminated from a job that he was physically capable of performing, the wage he was earning and would have continued to earn had he continued working for respondent should be imputed to him. As this was at least 90 percent of his AWW, his permanent partial general disability award is based upon his permanent functional impairment.[5]

The claimant also argues that even if he was terminated for cause from an accommodated job that was within his restrictions, he remains entitled to a work disability because his termination was not in good faith. In *Niesz*[6], the court found that where a worker's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work disability. In this case, however, respondent conducted an adequate investigation of the

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[2] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] K.S.A. 44-510e.

[6] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

facts. As noted, his supervisor had counseled claimant about his attendance. Except for wanting to lie down, no mention was made of needing additional accommodations or a change in jobs. No physician's restrictions mention lying down as a necessary accommodation. And although the videotape suggests claimant may have been required to do some bending, twisting and reaching in his accommodated job, claimant did not complain to respondent about those activities. The evidence shows that respondent did not act arbitrarily or in bad faith.

Claimant was terminated for cause from an accommodated job which was within his restrictions. Accordingly, the post-injury wage claimant was earning with respondent before his termination will be imputed to him as evidence of what claimant retains the ability to earn. As this wage was more than 90 percent of the average gross weekly wage claimant was earning at time of this accident, he is precluded from receiving a permanent partial disability award in excess of the percentage of functional impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 10, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Mark J. Hoffmeister, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director